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Supreme Court, U.S.
FILED
JUL 19 2002
CLERK

No. 01-1843

IN THE

Supreme Court of the United States

MERCY HOSPITAL, INC.,

Petitioner,

v.

GREGORY FOGLEMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

DONALD H. BROBST
Counsel of Record
JAMES C. OSCHAL
ELIZABETH C. LEO
ROSENN, JENKINS & GREENWALD, LLP
Attorneys for Respondent
15 South Franklin Street
Wilkes-Barre, PA 18711-0075
(570) 826-5600

175101

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Whether an individual has standing to assert a claim pursuant to 42 U.S.C. § 12203(b) against his employer under the Americans With Disabilities Act ("ADA") alleging that he was discriminated against because a relative and co-employee had previously filed an ADA claim against the employer where the individual did not assert any rights under the ADA and did not participate in any way in his co-employee's ADA claim.

2. Whether an individual who was perceived by an employer to have participated in a claim under the Americans with Disabilities Act has standing to sue for alleged discrimination.

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REASONS FOR DENYING THE WRIT

A. The Circuit Court's Decision Is Not In Conflict With Decisions In Other Circuits.

Petitioner, Mercy Hospital, asserts that the decision of the United States Court of Appeals for the Third Circuit created a conflict among the Circuits. However, no such conflict exists. Specifically, Petitioner argues that there is a conflict in the Circuits, citing *Holt v. JTM Industries, Inc.*, 89 F.3d 1224 (5th Cir. 1996), and *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir. 1998), as being in conflict with the instant case.[1] However, the Circuit Court's decision herein is consistent with both *Holt* and *Smith* with respect to the retaliation provisions of the ADA (and the Age Discrimination in Employment Act ("ADEA")). Moreover, neither *Holt* nor *Smith* addressed the other two issues decided by the Circuit Court. Accordingly, there is no conflict among the Circuits.

In this case, the Circuit Court decided three issues, the first of which related to the ADA, 42 U.S.C. § 12203(a)

1. In *Holt*, the United States Court of Appeals for the Fifth Circuit held that the plain language of the ADEA did not confer automatic standing upon a relative of an individual who participated in protected activity under the retaliation provision of the statute. In *Smith*, the Eighth Circuit determined that the plaintiff could not establish the causation element of her *prima facie* case of retaliation discrimination under Title VII because she could not establish that her employer was aware of her relationship to her boyfriend, who had filed a claim against their common employer. While the *Smith* decision did not analyze the issue in the context of automatic standing, the Court ultimately dismissed the plaintiff's retaliation claim because she could not establish that the employer's decision to terminate her was motivated by anti-discriminatory animus.

(the "Retaliation Provision") (and similar provisions under the ADEA and PHRA). The Third Circuit held, in accordance with *Holt* and *Smith*, that Respondent, Greg Fogleman, could not bring a retaliation claim against his employer when he had not participated in any way in his father's lawsuit against their common employer. Thus, with respect to the Retaliation Provision of the ADA, *the decision of the Third Circuit Court of Appeals is wholly consistent with the holdings in Holt and Smith.*

The Third Circuit's decision did not end there, however. The Circuit Court next analyzed a separate provision of the ADA, 42 U.S.C. § 12203(b) (the "Interference Provision") as it applied to Respondent. Specifically, the Interference Provision of the ADA provides:

> It shall be unlawful to coerce, intimidate, or interfere with any individual in the exercise or enjoyment of or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by this chapter.

42 U.S.C. § 12203(b).

The Circuit Court analyzed this issue independently from the Retaliation Provision, and reached a different conclusion, based in part, on the "more broadly" sweeping language of the Interference Provision. *See* Circuit Court Opinion at 15a. Notably, neither *Holt* nor *Smith* addressed this issue at all. After comparing the language of the Interference Provision of the ADA to the interference provision of the National Labor Relations Act ("NLRA"), the Circuit Court held that the broad Interference Provision of the ADA permits the Respondent to proceed in his third-party retaliation

claim against Petitioner. Circuit Court Opinion at 16a-17a. This holding is consistent with cases within and without the Third Circuit under the NLRA. *See Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.3d 400, 407-409 (3d Cir. 1990) (holding that retaliation against individual because her family members supported unionization effort violated interference provision of NLRA); *Tasty Baking Co. v. NLRB*, 352 F.3d 114, 127-128 (D.C. Cir. 2001) (collecting cases) (holding that demotion of wife because of union organizing efforts of husband violated interference provision of NLRA); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-1089 (7th Cir. 1987) (holding that firing of mother because of co-employee son's union activities violated interference provision of NLRA). Circuit Court Opinion at 16a.

Petitioner submits that this second holding of the Circuit Court was in error, but confuses the issue by suggesting that this holding is in conflict with *Smith* and *Holt*. As discussed *supra*, *Smith* and *Holt* did not address the interference provisions of any statute. Rather, those decisions were limited to an analysis of the retaliation provisions of the discrimination statutes. In fact, the statutes at issue in *Holt* (ADEA) and *Smith* (Title VII) do not even have interference provisions in addition to the retaliation provisions contained in those statutes.

Petitioner also suggests that conferring standing to Respondent under the Interference Provision after refusing to confer standing upon Respondent under the Retaliation Provision negates the significance of the Retaliation Provision. Nothing could be further from the truth. The separate statutory provisions apply to different situations, and the Court analyzed the language of both statutes. In its Petition for Writ of Certiorari, Petitioner cites no authority supporting its position that the Circuit Court's analysis under the Interference Provision was flawed, and points to no Circuit opinions that are in conflict

with the Circuit Court's decision with respect to the Interference Provision. Moreover, Respondent is not aware of any decisions in other circuits which are in conflict with the Circuit Court's interpretation of the Interference Provision. Thus, there is no conflict within the Circuits with respect to the Interference Provision of the ADA. Accordingly, the Petitioner's erroneous suggestion that the Third Circuit's decision with respect to the Interference Provision of the ADA is in conflict with *Holt* and *Smith* has no merit. The only aspect of the Third Circuit's opinion that can be fairly compared to *Smith* and *Holt* is the first aspect of the holding (regarding the Retaliation Provision), which is wholly consistent with *Holt* and *Smith*.[2]

B. The Circuit Court's Decision Is Consistent With Decisions Of This Court Under The ADA.

In its Petition, the Petitioner argues that the Circuit Court's opinion is contrary to recent decisions of this Court. In support of its position, Petitioner cites *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002); *Murphy v. United Parcel Service*, 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999); *Sutton v. United Airlines*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999); and *Chevron USA, Inc. v. Echazabal*, __ U.S. __, 122 S. Ct. 2045, __ L. Ed. 2d __ (2002). However, none of these cases relates to any of the issues decided by the Circuit Court. Rather, these cases relate to determining whether the plaintiffs were disabled under the ADA, an issue that is not,

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2. Petitioner's public policy argument is similarly without merit. Certainly, the intent of an individual can be proven by direct or indirect evidence and does not require live testimony. Moreover, Respondent is not aware of any "absolute right to terminate at will employees" for discriminatory reasons.

and never has been, raised in this case. Accordingly, there is nothing in the Circuit Court's opinion that is in any way inconsistent with any of the cases decided under the ADA by this Court.

C. The Circuit Court's Decision With Respect To Respondent's Perception Theory Is Consistent With Circuit Law.

The third holding of the Circuit Court relates to Respondent's perception theory of liability. The Court held that the perception theory of liability does not contradict the plain text of the discrimination statutes and that the retaliation provisions directly support a perception theory of discrimination in light of a discriminatory motive of the employer. Circuit Court Opinion at 18a-19a. If the employer engaged in the practice of making decisions based on certain illegal criteria, it has engaged in discrimination. Accordingly, the law will protect the employee, even if the employer's discriminatory motive was based upon a mistaken fact. Specifically, the Court held that, "the law focuses on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus were actually correct as a factual matter." Circuit Court Opinion at 18a. The Circuit Court utilized an analogy which bears repeating:

> Imagine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim

> or not, was treated worse than he otherwise would have been for reasons prohibited by the statutes . . . Accordingly, we hold that if Greg can show as he claims that adverse action was taken against him because Mercy thought that he was assisting his father and thereby engaging in protected activity, *it does not matter whether Mercy's perception was factually correct.*

Circuit Court Opinion at 18a-19a (emphasis added).

As the Circuit Court noted, its holding with respect to the perception theory is consistent with other labor law cases in the Third Circuit. *See Fogerty v. Boles*, 121 F.3d 886, 891 (3d Cir. 1997); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987). Circuit Court Opinion at 19a. Moreover, Petitioner points to no authority in any Circuit that is in conflict with the Circuit Court's decision with respect to Respondent's perception theory of liability, and Respondent is not aware of any opinions in the sister circuits which conflict with the Circuit Court's Opinion on this issue.

CONCLUSION

For the aforementioned reasons, there is no reason to grant Petitioner's Petition for Writ of Certiorari. Moreover, the decision of the Circuit Court is consistent with Third Circuit and other Circuit Court opinions. Accordingly, Respondent respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,
DONALD H. BROBST
Counsel of Record
JAMES C. OSCHAL
ELIZABETH C. LEO
ROSENN, JENKINS & GREENWALD, LLP
Attorneys for Respondent
15 South Franklin Street
Wilkes-Barre, PA 18711-0075
(570) 826-5600